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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/643,244

08/18/2003

Stephen John Dyks

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

01/07/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/643,244	Applicant(s) DYKS ET AL.	
	Examiner Kelly Mahafkey	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 15 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13 is/are pending in the application.
 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-13 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☐ None of:
 1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Amendments made 10/15/07 have been entered.
Claims 1-13 remain pending.

Claim Rejections - 35 USC § 112

The previous 112 1st paragraph rejection of claims 1-13 has been withdrawn in light of applicant's amendments made 10/15/07.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over OLS (German 3417196 A1) in view of Hui (ed.) (Dairy Science and Technology Handbook) and Ezaki (JP App # 60230711). The references and rejection are incorporated herein and as cited in the office action mailed May 15, 2007. Regarding the newly added limitations, specifically filling two open cavities one on each forming element, then allowing the product to expand, and then moving the two cavities opposite one another, OLS teaches in Figure 3 of filling the mold cavities after they are moved opposite one another and allowing the product to expand and OLS teaches that product can be injected into the mold cavities, thus suggesting that the molds can be filled prior to the molds moving toward one another (Specification page 5). Furthermore, as taught by Ezaki it was known in the art at the time the invention was made to fill mold cavities before they were moved opposite one another. To fill the mold cavities before or after the mold cavities are moved opposite one another would not bring a patentable distinction to the claims absent any clear and convincing arguments to the contrary. To fill the cavities before or after they are moved opposite one another would be a matter of design choice based on the available equipment. One would have been motivated to chose filling the cavities with a two element output nozzle, before the cavities are moved opposite one another, in order to have the ability to introduce two different types of flavors into the confection.

Response to Arguments

Applicant's arguments filed 10/15/07 have been fully considered but they are not persuasive.

Applicant argues that the references of record do not teach filling two open cavities, allowing the product to expand outside its respective cavity and then moving the cavities opposite one another. Applicant is referred to OLS, Figure 1 which show the providing of two separate forming elements (items 6a and 6b); OLS, Specification page 5, which teaches that product can be injected into the mold cavities, thus suggesting that the molds can be filled prior to the molds moving toward one another; OLS, Figure 2 which show the providing of open cavities on the surface of the forming elements; and OLS, Figures 3 and 4 which show the providing of a filling device for the cavities, filling the cavities, the filling as expanded inside and outside of the cavity, and the two cavities as moving towards one another wherein the product in both cavities are pressed against one another. As previously stated (see the Office action mailed May 15, 2007), OLS is silent to the separate mold cavities as filled prior to the cavities moving opposite one another. Applicant is referred to Ezaki Abstract and Figure 1, which teaches of molding frozen confections in which two separate mold cavities are filled prior to the cavities moving opposite one another. Thus, applicant's argument that the references of record do not teach filling two open cavities, allowing the product to expand outside its respective cavity and then moving the cavities opposite one another is not convincing.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Group 1700

Kelly Mahafkey
Examiner
Art Unit 1794

